90-1190

Supreme Court, U.S.
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NO: _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANTHONY VAUGHAN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' failure to consider all the relevant findings of fact of a district court when it reviews that district court's choice of appropriate initial guideline offense category is a manifestation of the Appellate Court's failure to give due deference to the Trial Court's application of the Guidelines to the facts in violation of 18 U.S.C. 3742 (e).

2. Whether a Ruling of the Circuit Court of Appeals mandating the District Court to apply a particular guideline offense category to a defendant's conduct when that Appellate Court has failed to consider the District Court's total array of findings of fact in its selection of a different, but related, guideline section, is a violation of intent of the United States Sentencing Commission's Guideline Manual.

3. Whether a District Court may consider its assessment of the character, credibility and demeanor of a victim-witness as a factor in determining the existence of special circumstances justifying a departure from the guidelines pursuant to the Policy Statement of Guidelines Manual Section 5K2.0.

(Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted on the above questions, but does not include Question 3 among the reasons for the grant of certoriari).

LIST OF PARTIES

The parties to the proceedings below were Anthony Vaughan, Gregory Bigelow and Vincent Lima, Defendants-Appellants in 89-2292, 89-2293, 89-2294, and appellees in the appeal by the United States of America, as appellant in 89-2274.

The parties to this petition are Petitioner, Anthony Vaughan and the Respondent, United States of America.

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ANTHONY VAUGHAN, Petitioner,

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UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Anthony Vaughan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on .

OPINIONS BELOW

The Opinion of the Court of Appeals for the Seventh Circuit is not reported. It is

reprinted in Appendix hereto, p. A8, infra.

JURISDICTION

Jurisdiction is founded on Title 28, Sec. 1254 (1). Courts of appeals, review by the Supreme Court; writ of certiorari.

STATUTES INVOLVED

United States Sentencing Commission, Guidelines Manual, Section 2B3.2 Extortion by Force or Threat of Injury or Serious Damage.

United States Sentencing Commission, Guideline Manual, Section 2E2.1 Making, Financing, or Collecting an Extortionate Extension of Credit.

Guidelines Manual, 5K2.10 Victim's Conduct.

18 U.S.C. Section 894 Collection of Extensions of Credit by Extortionate Means.

18 U.S.C. Section 3742. Review of Sentence.

STATEMENT OF THE CASE

In this case, Petitioner, Anthony Vaughan, and his Co-Defendants, Gregory Bigelow and Vincent Lima, were charged in a 9 Count Indictment with violations of 18 United States Code Section 894.

Following a jury trial, each Defendant was found guilty of each count as charged. Petitioner Vaughan was sentenced to fifteen months imprisonment and a fine of $4,450.00 on

May 18, 1989. The Government appealed that sentence to the Seventh Circuit Court of Appeals. In an opinion dated September 28, 1990 that Court vacated the sentence and remanded with instructions.

The evidence at trial indicated that the Petitioner, Vaughan, and Defendant, Bigelow, had contracted with Lima, a wholesale meat distributor in Chicago, Illinois, to collect certain monies due Lima from customers for deliveries of meat products. Those customers included the victim herein, William Burks.

During the course of their attempt to collect monies from Burks, an altercation occurred during a confrontation at the door of Burks' residence. In that incident, Petitioner's Co-Defendant, Bigelow, struck Burks with his fist.

At the sentencing hearing, an issue arose as to which offense guideline section was

appropriate for the categorization of the Defendants' conduct. In the case of the Petitioner, Vaughan, and his Co-Defendant, Bigelow, the Government argued that Section 2E2.1, Making, Financing or Collecting an Extortionate Extension of Credit was applicable. The Petitioner sought the application of Section 2B3.2, Extortion by Force or Threat of Injury or Serious Damage.

The District Court agreed with Petitioner-Vaughan, and it found that 2B3.2 was the most appropriate guideline applicable to the nature of the Defendant's conduct. The District Court found that the Petitioner had no original intent of engaging in any unlawful activity. The District Court had found that the Petitioner's conduct was an "aberration" unintended and very likely, the first time anything of this nature had ever occurred. The District Court noted that Burks'

continuing obligation to pay Lima did not come about as a result of any action by Co-Defendant Lima himself. Rather, the District Court found that Burks had defrauded and "snookered" Lima out of the goods (the value of which he sought to recover) by giving him a check he had no intention of ever making good. This debtor/creditor relationship was created involuntarily through the deceptive acts of the victim. The Burks/Lima transaction did not represent an agreed "extension" of credit by Lima, rather, it manifested the creation of unintended debtor/creditor relationship for the unilateral benefit of the unscrupulous victim.

In addition to the above findings, the District Court found that the activities of the Petitioner and his Co-Defendant, Bigelow, did not constitute loan sharking. The Court found that there was no indication of

organized crime activity and the court also noted that there was no interest collected on the debt. Another issue was created at the sentencing hearing when, notwithstanding the opposition of the Government, the District Court chose to apply guideline Section 5K2.10 Victim's Conduct (Policy Statement), as a basis for departure.

The Court believed that the evidence introduced during the trial proceedings supported a sentencing departure based upon the applicability of this Guideline category.

The District Court indicated that it believed the section was applicable because the "debt" sought to be collected had never been contemplated by Lima. It would never have existed but for the victim's having defrauded Lima. The evidence of threatening language introduced at trial was gathered during the taping of telephone conversations

initiated by the victim at the suggestion of investigating authorities. The incident at the victim's home, which resulted in his being struck by Defendant Bigelow, was "triggered" by the victim's own conduct. The victim's implications that he, in fact, possessed money sufficient to pay for the goods he had "snookered" away from Lima helped induce the offensive language which was directed at him.

The Petitioner Vaughan and his Co-Defendants appealed the convictions to the Appellate Court for the Seventh Circuit. The Government cross-appealed, raising the issues of the appropriateness of the District Court's application of offense category guideline 2B3.2 and the appropriateness of the District Court's decision to select 5K2.10 as a basis for departure.

The Seventh Circuit Court of Appeals affirmed the convictions of the Petitioner and

his Co-Defendants but vacated the sentences of each. The Seventh Circuit directed the District Court to redetermine the Petitioner's sentence applying guideline 2E2.1 Making, Financing or Collecting an Extortionate Extension of Credit to the Petitioner's conduct, and to recompute the sentence without allowing a departure under the category of Victim Conduct, 5K2.10.

THE RULING BELOW.

In reaching its decision, the Seventh Circuit cited, as authority, U.S. v. DeCicco, 899 F.2d 1531 (7th Cir. 1990). DeCicco holds that the determination of the scope of a particular guideline category is a legal question and it is reviewed "de novo". Accordingly, the Seventh Circuit Court of Appeals has reasoned that it has the plenary power to interpret Guideline Sections 2B3.2,

2E2.1, and 5K2.10 and determine whether the Sentencing Commission intended these guidelines to be applicable to the facts of this case.

While the Court engaged in a thoughtful discourse on its interpretation of these particular Guideline categories, the Seventh Circuit failed to consider the complete array of particularized factual determinations made by the District Court. The Seventh Circuit ruled that the District Court's finding that the absence of loan sharking, and the absence of elements of "traditional" organized crime was not a basis to refuse to apply Section 2E2.1. The Seventh Circuit then engaged in its analysis of the "scope" of 2E2.1. After concluding that the activities of the Petitioner Vaughan and his Co-Defendant were sufficiently "organized", the Court ruled that Guideline offense category Section 2E2.1

should have been applied to the Petitioner's conduct.

The Seventh Circuit also ruled that evidence of loan sharking need not be present for an application of category 2E2.1.

However, in its eagerness to define the legal "scope" of guideline category 2E2.1, the Court failed to give due deference to the District Court's other factual determinations. The Seventh Circuit did not address the District Court's findings that the credit had not been "extended" by Lima, but rather, was the consequence of wrongful deception of Lima by the victim himself. The Seventh Circuit did not consider the District Court's finding that the conduct of the Petitioner was an aberration, unintended and isolated.

In focusing solely upon its interpretation of the scope of guideline 2E2.1, in failing to consider the District

Court's determination of all the relevant "generic" elements of the Petitioner's conduct, the Circuit Court of Appeals has failed to adequately defer to the District Court's application of the Guidelines to the facts.

The Seventh Circuit Court of Appeals also directed the District Court to recompute the Petitioner's sentence without allowing a departure for Victim Conduct, pursuant to 5K2.10. In so doing, Seventh Circuit again failed to consider the complete array of factual determinations made by the District Court. The Seventh Circuit ruled that the District Court's determination that the victim had "an unpleasant voice and demeanor" and was, at worst, an "unpleasant and untrustworthy person" were not sufficient factual elements to authorize application of this Guideline.

Assuming this may be true for purposes of this review, what is significant about the ruling of the Seventh Circuit is the Court's failure to factor in the other findings.

The Court failed to consider the District Court's findings that the victim's conduct triggered the incidence of violence at the home, the findings that the victim's statements induced the offense language used by the Defendants, the finding that the Victim defrauded the Co-Defendant into the creation of the initial obligation, that the threatening statements made to the Victim were recorded during calls initiated by the victim.

By failing to consider all the relevant findings, the Seventh Circuit has failed to give due deference to the Trial Court's application of the guidelines to the facts. This is a clear violation of 18 U.S.C. 3742 (e). In addition, this manifests a direct conflict with

the intent of the United States Sentencing Commission's Guidelines Manual.

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S HAVING EXERCISED PLENARY REVIEW OF THE LEGAL "SCOPE" OF A GUIDELINE AS JUSTIFICATION TO REVERSE A DISTRICT COURT'S CHOICE OF GUIDELINE CATEGORY WITHOUT HAVING CONSIDERED THAT COURT'S TOTAL ARRAY OF FACTUAL DETERMINATIONS IN ITS CHOICE IS INCONSISTENT WITH THE INTENT OF THE U.S. SENTENCING COMMISSION AND A VIOLATION OF 18 U.S.C. SECTION 3742 (e).

This case manifests the fundamental conflict which exists between the Circuit Courts of Appeal, including the Seventh Circuit, and the United States Sentencing Commission over the basic major policy objective of the Guidelines. It is important because the question presented herein is one of first impression for this Honorable Court. American Federation of Musicians v. Wittstein, 379 U.S. 171, 85 S.Ct. 300, 13 L. Ed. 2d 214 (1964).

The Sentencing Commission intended to write guidelines that classify and categorize "generic" offensive conduct. The Commission

did not intend to write guideline categories that mimic statutory offenses. The Commission indicated in its introductory chapter:

> "The Commission, in its January 1987 Revised Draft and the present guidelines, has moved closer to a "charge offense" system. The system is not, however, pure; it has a number of real elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law have forced the Commission to write guidelines that are descriptive of generic conduct rather than tracking purely statutory language". U.S.S.G. Ch. 1,4(a) p.s. (emphasis added)

In this case, the Seventh Circuit was influenced by its belief that the Sentencing Guidelines provide that violations of 18 U.S.C. 894 are necessarily governed by Guideline Section 2E2.1.

A clear reading of the Guidelines indicates that this is not true. The Sentencing Commission did not intend that violations of any particular statutory offense necessarily fall within a particular guideline

offense category. The Commission intended that the sentencing court look to the generic nature of the conduct, make its findings of fact, identify the offensive conduct and apply the guidelines to the identified offensive conduct.

The introduction to the Statutory Index provides:

> "This index specifies the guideline section or sections ordinarily applicable to the statute of conviction. If more than one guideline section is referenced for the particular statute, use the guideline most appropriate for the nature of the offense conduct charged in the count of which the defendant was convicted. If, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted. U.S.S.G. A.1 intro. comment.

The standard of review of the District Court's application of this process has been provided by Congress in 18 U.S.C. 3742 (e).

The Circuit of Appeals is required to give "due deference" to the District Court's application of the Guidelines to the facts.

The decision in this case is a clear manifestation of the potentiality of abuse in the review process. The Seventh Circuit has misinterpreted the significance of the Sentencing Commission's suggested guideline categories; it has failed to consider all the findings of the lower court in attempting to define the Defendant's offensive conduct, (in a generic sense). This failure to consider all the findings of the District Court manifests the conflict between the role assumed by the Seventh Circuit Court of Appeals in the review of the sentence and the role contemplated by Congress with the enactment of 18 U.S.C. 3742(e). The Circuit Court of Appeals failure to consider the entire record is a further manifestation of

that Court's failure to honor the role of the District Court as anticipated by the Sentencing Commission in initially defining the offensive conduct sought to be punished.

It is imperative that this Honorable Court grant this writ of certiorari in order that the actual intent of the Sentencing Commission and the Congress of the United States be effectuated, in practice.

To permit the U.S. Courts of Appeals, to ignore the District Court's complete factual determinations is to allow the Court of Appeals to ignore the basic policy objective of the Sentencing Commission and to "de novo" determine the appropriate sentence. It was not the anticipated role of the Court of Appeals to mandate the application of a particular guideline category based solely upon that Court's interpretation of the legal "scope" of the Guideline.

The instant case manifests the manner in which the Court of Appeals can abrogate the intent of the Sentencing Commission and the intent of Congress of the United States. In describing its role as that as defining the "scope" of a guideline, without having considered the factually determined, "generic" elements of a Defendant's offensive conduct, the Seventh circuit has, in effect, mandated the application, and non-application, of the Guideline categories it has selected on its own. It has, in effect, determined the Defendant's sentence in its own conclusive and plenary manner. It has sentenced a Defendant "de novo".

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

_____

TIMOTHY BIASIELLO
Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA

J U D G M E N T
INCLUDING SENTENCE
v. U N D E R T H E
SENTENCING REFORM ACT
Case Number: 88 CR 411-2

ANTHONY W. VAUGHAN

Michael Goggin
(Defendants Attorney)

The Defendant was found guilty on counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 after a plea guilty.

Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

Title & Section	Nature of Offense
18 USC 894	Extortion

Count Number(s)
1,2,3,4,5,6,7,8, and 9

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: 337-67-8539;

Defendant's mailing address: 7950 West Lawrence, Apt. 2H, Norridge, Illinois;

Defendant's residence address: Same

Date of Imposition of Sentence: May 18, 1989;

JOHN A. NORDBERG, U.S. DISTRICT JUDGE;

Date: May 18, 1989

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Fifteen (15) Months on counts 1,2,3,4,5,6,7,8 and 9 concurrently. Defendant is to be given credit for one day served in custody.

___ The Court makes the following recommendations to the Bureau of Prisons:

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district,

__ at _____ a.m / p.m. on _____.

__ as notified by the Marshal.

_x_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

__ before 2 p.m. on _____.

__ as notified by the United States Marshal.

_x_ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

_____

at _____

_____,

with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: Anthony W. Vaughan
Case Number: 88 CR 411-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) Years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remain unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

__ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

__ Court finds that defendant is unable to pay costs of custody or supervision.

Defendant: Anthony Vaughan
Case Number: 88 CR 411-1

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1. The defendant shall not commit another Federal, state or local crime;

2. the defendant shall not leave the judicial district without the permission of the court of probation officer;

3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;

5. the defendant shall support his or her dependents and meet other family responsibilities;

6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7. the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any parphernalia related to such substances, except as prescribed by a physicians;

9. the defendant shall not frequent places where controlled substances are illegally soled, used distributed, or administered;

10. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any controband observed in plain view by the probation officer;

12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.

13. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the

permission of the court;

14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occassioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this judgment.

Defendant: Anthony W. Vaughan
Case Number: 88 CR 411-1

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $4,450.00, consisting of a fine of $4,000.00 and a special assessment of $450.00 ($50.00 for each count)

__ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid ___ immediately.
_x_ as follows:

over the period of supervised release as directed by the Probation Office.

___ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

___ The interest requirement is waived.
_x_ The interest requirement is modified as follows:

Interest to be paid over the period of supervised release as directed by the Probation Office.

NO: _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-2274, 89-2292, 89-2293, 89-2294

UNITED STATES OF AMERICA
Plaintiff-Appellee, Cross-Appellant,

v.

GREGORY SCOTT BIGELOW, VINCENT LIMA,
and ANTHONY W. VAUGHAN,
Defendants-Appellee, Cross-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 88 CR 411-John A. Nordberg, Judge

Argued April 12, 1990 -
Decided September 28, 1990

Before BAUER, Chief Judge, CUMMINGS and WOOU, Circuit Judges.

BAUER, Chief Judge. Carl Sandberg once described Chicago as "Hog Butcher for the

World...Stormy, busky, brawling, City of the Big Shoulders."[1] This case combines these elements with unfortunate results. Vincent L. Lima, a wholesale meat distributor, hired two rather large gentlemen, Anthony W. Vaughan and Gregory Scott Bigelow, to collect debts owed to Lima's company. The strong-arm tactics employed by these collectors led to convictions of all three men for conspiracy to participate and the knowing participation in the use of extortionate means to collect extensions of credit, in violation of 18 U.S.C. Section 894. All three defendants have appealed their convictions. In addition, the government has appealed the district court's downward departures from the penalties established under the Sentencing Guidelines. We affirm the convictions of Lima, Bigelow and Vaughan. We vacate the defendants' sentences

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[1] Carl Sandburg, "Chicago," reprinted in The N of American Verse 422 (1976).

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as given, however, and remand for resentencing by the district court consistent with the Guidelines and this opinion.

I. The Facts

Vincent L. Lima is the owner of M & V Provisions ("M & V"), a wholesale meat distributor, in Chicago, Illinois. Lima sells large quantities of meat to retail operations frequently on credit. M & V has ten employees, but Lima himself handles the collections on large accounts.

On April 14, 1988, Anthony W. Vaughan and Gregory Scott Bigelow were walking around the wholesale meat dealers' business district, drumming up business for their new enterprise: "Crash Course Collections, Inc." Vaughan, who stands between 6'6" and 6'8" feet tall and is relatively husky, and Bigelow, two inches shorter and slightly thinner, were visiting distributors and handing out business cards. The cards stated simply, "We guarantee

results." It gave just their first names, "Tony" and "Scott," and Bigelow added a drawing of a funeral wreath. AT M & V, they talked with Lima's son, Larry, who took one of the cards and passed it along to his father.

Vincent Lima subsequently hired Vaughan and Bigelow to collect on one of his troubled accounts, James Lekkas of Chicago Gyros & Produce. Lekkas owed Lima and M & V approximately $5,000.00. The account had been outstanding since the fall of 1987. Lekkas had twice bounced checks Nos. for his account with Lima and was now apparently hiding from Lima. On April 18, Vaughan and Bigelow confronted Lekkas outside a produce store and demanded that he pay his debt to Lima. When Lekkas claimed that he did not have enough money to pay his bill, Vaughan and Bigelow threatened him and tried to push him inside their car. Breaking free, Lekkas ran inside a nearby store where onlookers had called the

police. Vaughan and Bigelow jumped in their car and fled before the police arrived.

Later, Lekkas called Lima and described his treatment by these newly-hired collectors. Lima responded that the matter was out of his hands and that Lekkas would have to deal with the collectors now. Indeed he would Lekkas continued to receive threatening phone calls from Vaughan informing him to pay the money he owed Lima and that "we know where you live." Two weeks after the incident, Lekkas sent an initial payment of $500.00 to Lima.

After the successful Lekkas collection, Lima gave additional business to Crash Course Collections, Inc. Vaughan and Bigelow were asked to collect from William Burks of Rib King in Dolton, Illinois. Burks had taken delivery of six or seven shipments of meat worth $23,000.00 on credit, from May to October 1987. Despite several inquiries by Lima and Burks' repeated promises to pay, the

debt was never satisfied. Burks had written several bad checks to Lima, and was obviously a source of continuing frustration.

On May 6, 1988, Vaughan and Bigelow appeared at Burks' home at 7:30 in the morning. Burks' thirteen year-old son, John, answered the door and the collectors asked for his father. Burks came downstairs and met Vaughan and Bigelow at the door. They suggested that Burks invite them inside. Burks refused. At this point, all hell broke loose.

Vaughan and Bigelow tried to push past the 270-pound Burks and into his house. When Burks pushed back, Bigelow punched him in the face, knocking Burks to the ground and ripping a whole in hi lip. John Burks, having seen the punch, ran into the next room to call the police. Bigelow chased him, shoved him into the couch, and tore the phone from the wall. Mrs. Burks, hearing the commotion, came

running downstairs from the second floor and asked what was happening. She was told to "shut the fuck up." Vaughan and Bigelow asked Burks if he knew Vince (Lima) from M & V. Burks admitted he did. The men told Burks to "come up with $10,000.00 by Sunday, $3,000.00 a week after that, or you're dead." Vaughan and Bigelow then left the house. Burks immediately called Lima and informed him of the attack. Lima responded simply "pay up."

Burks decided to take the story of his assault to a more sympathetic listener, the FBI. After hearing Burks' story, an agent placed a recorder on Burks' home phone. Over the next several days, agents monitored and recorded a series of calls between Burks and Lima, and Burks, Vaughan and Bigelow, in which the defendants repeatedly threatened Burks and his family if he failed to pay his debt to Lima and M & V. On May 10, 1988, Vaughan and Lima were arrested. Bigelow, after promising

to surrender himself to FBI agents on May 23, 1988, fled Chicago and was eventually found in California. He was returned to Chicago were he was arrested and charged.

Lima, Bigelow and Vaughan were each charged in a nine-count indictment with conspiracy to participate and knowing participation in the use of extortionate means to U.S.C. Section 894. Following a jury trial before Judge Nordberg from January 23 to February 3, 1989, Lima was found guilty on seven counts, Bigelow on eight counts and Vaughan on all nine. On May 18, 1989, Judge Nordberg sentenced Lima to four weekends in custody, four years probation, four hundred hours of community service and a fine of $5,719.33. Bigelow received a 24-month sentence, to be followed by three years probation. Vaughan was given a 15-month sentence and three years probation. Each of the defendants now appeals his conviction. In

addition, the government has appealed the sentences imposed by the district court. We will consider each of the issues raised in turn.

II. Lima: The Ostrich Instruction

In his charge to the jury, Judge Nordberg gave the following instruction on the issue of Lima's knowledge.

> You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that what they seemed, or that someone has withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly as I have used that word.

Lima contends that this discussion of conscious avoidance, the so-called "ostrich instruction," was erroneously given because such an instruction is inappropriate where actual knowledge is an issue and no question of deliberate avoidance exists. In the alternative, Lima argues that even if an "ostrich instruction" was acceptable, the working of this particular instruction was

improper in the context of this case.

AT the outset, we note that in assessing the district court's determination to give this instruction, we must review the evidence and any reasonable inferences that can be drawn from that evidence in the light most favorable to the government. See United States v. Tulkington, 875 F.2d 591, 596 (7th Cir. 1989); United States v. Johnson, 605 F.2d 1025, 1028 (7th Cir. 1979). In addition, we do not review instructions in lonely isolation, but rather in the context of the trial as an integrated whole. See United States v. Hernero, 893 F.2d 1512, 1536 (and cases cited therein).

The language used in the district court's "ostrich instruction" was developed by this court in United States v. Ramsey, 785 F.2d 184, 190-91 (7th Cir. 1986). In Ramsey, we noted that every circuit has approved some form of deliberate avoidance instruction 785

F.2d at 189 (citing cases). Since then we have repeatedly approved the use of the language we provided there. See United States v. DeFazio, 899 F.2d 626, 635-36 (7th Cir. 1990); Herrero, 893 F.2d 1512; Talkington, 875 F.2d 591; United States tack at his home, Burks called Lima and described Bigelow and Vaughan's tactic. In subsequent conversations monitored and recorded by the FBI, Burks repeatedly warned Lima that Bigelow and Vaughan had beaten him and threatened his wife and son. Lima consistently responded that "the matter was out of his hands" or "you are dealing with them not me." Thus, the record indicates precisely the type of conscious avoidance of responsibility that is contemplated by the "ostrich instruction."

In his defense, Lima cites a series of Ninth Circuit cases challenging the use of the "ostrich instruction." See United States v. Alvarado, 838 F.2d 311 (9th Cir. 1988); United

States v. Pacific Hide and Fur Depot, 768 F.2d 1096 (9th Cir. 1985); United States v. Beckett, 724 F.2d 855 (9th Cir. 1984). In each of these cases, however, the facts and circumstances indicated either actual knowledge by the defendant or complete innocence. The choice for the jury was completely binary - there was no evidence of deliberate avoidance of actual knowledge. Thus, the Ninth Circuit held that an "ostrich instruction" under such circumstances unfairly confused the jury. Lima's case presents completely different facts. There was sufficient evidence that Lima willfully avoided strong evidence of wrongdoing by his hired collectors. The question of deliberate avoidance was thus an issue in determining Lima's guilt or innocence and an "ostrich instruction" was entirely appropriate.

Alternatively, Lima argues that even if an "ostrich instruction" were appropriate, the

language used by Judge Nordberg was unfairly confusing to the jury. Lima objected to the court's refusal to include additional paragraphs concerning reasonable doubt, negligence and other qualifying terms. As we have frequently noted, "small differences in the wording of instructions will rarely have such impact on the jury as to warrant reversal." United States v. Josefik, 753 F.2d 585, 589 (7th Cir. 1985); see also Ramsey, 785 F.2d at 190. Here, the qualifications suggested by Lima add little to the instruction used by the district court. These additions would have been largely repetitive and groundless. Further, the language adopted by Judge Nordberg was expressly approved by this court in Ramsey, 785 F.2d at 189. The district court was well within its considerable discretion in using this particular "ostrich instruction."

III. Bigelow: Hearsay Objections

Defendant, Bigelow argues in his appeal that the district court erred by admitting into evidence certain out-of-court statements by his girlfriend/fiancee, Maria Collazo. Ms. Collazo testified that Bigelow admitted to her that he had gone to a debtor's house to collect payment, that the debtor had been struck and that a phone had been ripped out of the wall during the incident. The government elicited this testimony, with the court's permission, in order to establish Bigelow's presence at Burks' house.

Bigelow now contends that these statements were inadmissible hearsay. We note that Bigelow bears a heavy burden in challenging an evidentiary ruling by the district court. A district court's decision to admit evidence is discretionary in nature and will only be reversed for a clear abuse of that discretion. See Herrero, 893 F.2d at 1530; Jones v. Hamelman, 869 F.2d 1023, 1027

(7th Cir. 1989).

In Bigelow's case this burden becomes unbearable; the statements at issue are not even properly defined as hearsay under the Federal Rules of Evidence. The statements offered through Collazo were admissions by a party-opponent and thus non-hearsay as defined by Fed. R. Evid. 801(d)(2). Judge Nordberg was obviously correct, therefore, in admitting Bigelow's declarations into evidence despite the objections.

Bigelow also argues that Collazo's testimony should have included a more complete version of his statements to her. In particular, Bigelow sought permission to admit his statement to Collazo that the FBI agents "had the man they wanted." Bigelow argues that the court's primary reason for barring this testimony was the erroneous belief that out-of-court exculpatory statements are never admissible. This argument badly

mischaracterizes the court's rationale for excluding the statements, and is found neither on the record nor in any logical inference based upon it. In short, the contention is hudicrous.

Bigelow's statement that the FBI "had the man they wanted" did create a dilemma for the district court. The difficulty with the declaration was not its exculpatory nature (which was questionable to begin with), but its potential conflict with the principles set forth in Braton v. United States, 391 U.S. 123 (1968).

In Bruton, two men, Bruton and Evans, were jointly tried for armed robbery. A postal inspector testified that Evans had confessed that he and Bruton had committed the robbery. In the instructions to the jury, the judge explained that Evans' confession was admissible only in relation to Evans and should not be considered during deliberations

on the question of Bruton's guilt or innocence. The Supreme Court held that admitting Evans' statement into evidence had violated Bruton's right to confront the witnesses against him. The Court held that a jury was incapable of performing the mental gymnastics demanded by the judge's limiting instruction, and thus the danger to Bruton could not be eliminated by that instruction.

Bigelow's declaration to Collazo that the FBI "had the man they wanted" obviously implicated Vaughan, Bigelow's co-defendant. Nevertheless, Bigelow contends that under the "doctrine of completeness" the entire substance of his remarks must be allowed to be heard. Bigelow apparently concedes that certain Bruton problems exist; however, he argues that they could have been circumvented by careful redaction. See Richardson v. Marsh, 481 U.S. 200 (1987) (Bruton not implicated where confession was properly

reacted to avoid reference to co-defendant).

The doctrine of completeness as cited by Bigelow sterns from Fed. R. Evid. 106, which provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106. This rule, however, applies only to written and recorded materials. Bigelow cites United States v. Castro, 813 F.2d 571 (2nd Cir. 1987), as support for extending the doctrine to oral statements. In Castro, a police officer was to testify that Castro had informed him that a bag of cocaine found in the house where Castro was arrested belonged to Castro's co-defendant. The district court required redaction of the proffered testimony to eliminate any reference to the co-defendant and allowed cross-examination of the police

officer to include references to Castro's failure to identify the cocaine.

In this case, no sterilizing redaction or limiting instruction could sensibly have removed the inculpatory nature of Bigelow's statement. The "man they wanted" could only be Vaughan, as there were only two men involved in the incident at the Burks' house. Allowing Bigelow's statement into evidence could well have jeopardized Vaughan's right to a fair trial. Thus, the district court's proper concerns for Vaughan's rights under Brutons foreclosed admission of the statement. The district court was within its discretion in rejecting Bigelow's requested evidence.

IV. Vaughan: Due Process Challenge to the Federal Sentencing Guidelines

Defendant Vaughan raises only one issue on appeal. He contends that the Sentencing Guidelines violate the due process clause of the fifth and fourteenth amendments. We have expressly rejected this challenge in United

States v. Pinto, 875 F.2d 143 (7th Cir. 1990), as has every Court of Appeals that has considered this issue, United States v. Seluk, 873 F.2d 15 (1st Cir. 1989); United States v. Viscaino, 870 F.2d 52 (2d Cir. 1989); United States v. Frank, 864 F.2d 992 (3d Cir. 1989); United States v. White, 869 F.2d 822 (5th Cir. 1989); United States v. Allen 873 F.2d 963 (6th Cir. 1989); United States v. Lano, 883 F.2d 56 (8th Cir. 1989); United States v. Brady, 895 F.2d 538 (9th Cir. 1990); United States v. Thomas, 884 F.2d 540 (10th Cir. 1989); United States v. Harris, 876 F.2d 1502 (11th Cir. 1989).

In Pinto, we stated that while the Guidelines standardize the sentencing process, they do not eliminate individualized sentences. 875 F.2d at 144-45. That such elements as Vaughan's acceptance of responsibility, his past criminal history, the conduct of his victim, and several other

factors were taken into consideration by the sentencing judge indicate that each sentence remains individualized. Moreover, as we noted in Pinto, even without such tailoring the Guidelines would pass constitutional muster in a noncapital case, as "criminals aren't entitled to sentences devised by judges rather than legislatures." At 145 (citing United States v. Oxford, 735 F.2d 276, 278 (7th Cir. 1984). Recently, we affirmed our holding in Pinto in rejecting yet another due process challenge to the Guidelines. United States v. Tholl, 895 F.2d 1178, 1180 (7th Cir. 1990). Vaughan's challenge here must fail as well.

V. The Government's Challenge of Application of the Sentencing Guidelines

The Sentencing Guidelines provide that the penalties for violation of 18 U.S.C. Section 894 are governed by Guideline Section 2E2.1 entitled "Making, Financing or Collecting and Extortionate Extension of Creidt." This section establishes a Base

Offense Level of 20 for these crimes. The government urged application of this Guideline to both Vaughan and Bigelow. Because Lima, however, was apparently not part of an ongoing pattern of extortion, the government suggested that the court apply the lesser Section 2B2.2, "Extortion by Force of Threat of Injury or Serious Damage." (Base Offense Level:18) to determine his sentence. Following a two-day hearing, the district court issued its sentences for three defendants on May 18, 1989. The court noted at the outset that despite the convictions under 18 U.S.C. Section 894, none of the defendants would be sentenced under Section 2E2.1 because no evidence of loan sharking or organized crime activity was presented in this case. Thus, Vaughan and Bigelow were sentenced under the lesser Section 2B3.2, while Lima was sentenced under Section 2A2.1, "Threatening Communications" (Base Offense Level:12). In

addition, the court departed downward two points from these offense levels for each defendant pursuant to Section 5K2.10 based on the contributory conduct of one of the victims, William Burks. Finally, the court applied Section 3B1.2(b) to Lima's sentence and thereunder reduced Lima's offense level and additional two point due to his "minor" role in the criminal activity. As a result of these various applications of the Guidelines, the court sentenced Vaughan to 15-months imprisonment and three years probation; Bigelow received a 24-month sentence and three year probation; and Lima received a sentence of four weekends in custody, four years probation, four hundred hours of community service and a fine of $5,719.33.

On cross-appeal, the government objects to three aspects of these sentences: first, that the district court applied the wrong Guideline offense section to the defendants'

actions; second, that the court improperly departed downward from the suggested sentences by considering the conduct of one of the victims, William Burks; and third, that the court wrongly characterized Lima's role as "minor" and therefore improperly adjusted his offense level. We will consider each of these arguments in turn.

A. Determination of the Applicable Guideline Section

Initially, in considering the application of the Guidelines to these offenses, we not that the district court's determination of which Guideline section to apply is a question of law and thus our review of that Section is plenary. See United States v. DeCicco, 899 F.2d 1531, 1535 (7th Cir. 1990). Although trial judges are afforded wide latitude on matters of departure from the Guidelines, See United States v. Schmude, 901 F.2d 555, 560 (7th Cir. 1990), determinations concerning the

scope of the Guidelines are more strictly construed. See United States v. Williams, 901 F.2d 1394 (7th Cir. 1990). This distinction stems from the nature of the Guidelines themselves. Their optimistic purpose is to create a consistent range of sentences for similar crimes, while allowing trial judges some flexibility within that framework for difficult or unusual cases. Thus trial courts, more closely familiar with the facts of each case and the flesh and blood defendants before them, are allowed significant discretion to depart from the established Guidelines where circumstances dictate. The role of this court, however, is to interpret the proper scope of the Guideline sections, and thus we review such questions de novo.

The district court determined that because no evidence of loan-sharking or organized crime was present in this case,

application of Section 2E2.1 was inappropriate. We disagree Vaughan and Bigelow were involved in an ongoing pattern of violence in order to collect extensions of credit. Their actions were organized, though crudely so, criminal activity: they circulated business cards,they threatened both Lekkas and Burks, they engaged in repeated phone conversations to collect the debts. This was not an isolated incident of criminal activity. Vaughan and Bigelow intended this enterprise to be their livelihood. Organized crime need not have European roots and clever nicknames to be menacing and dangerous. The use of violence to support an ongoing, criminal business practice is a form of organized crime, and sufficiently dangerous to warrant application of Section 2E2.1.

Neither does the fact that Vaughan and Bigelow were attempting to collect legitimate business debts and did not extend the credit

themselves remove their conduct from the scope of Section 2E2.1. The danger of extortion and loan-sharking lies primarily in the ruthless use of violence and mayhem to ensure collection of the debt. The usurious rates of interest typical to loan-sharking arrangements are criminal as well, but it is the violence, not the corrupt baking practice, that is the principal object of the law. Vaughan and Bigelow used violence in an ongoing, organized criminal activity to collect extensions of credit. Their conduct fell within the scope of Section 2E2.1, and the district court should have applied this section in determining their sentences.

Vincent Lima, as the district court properly found, was not part of this ongoing pattern of criminal activity. Therefore, Section 2E2.1 does not govern his sentence. Lima, however, did participate in and benefit from the extortion. As the jury found, Lima

knew of the threats and violence used by Vaughan and Bigelow against Lekkas and Burks, and enjoyed the fruits of this scheme. He warned Burks, "Just pay these guys and you won't have any problem." Therefore, Lima's conduct was properly governed by Section 2B3.2, "Extortion by Force of Threat of Injury or Serious Damage."

As the Application Notes to Section 2B3.2 state:

> This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else,"...ordinarily should be treated under this section.

(Emphasis added). As the commentary suggests, this section has been broadly construed. The Third Circuit has applied Section 2B3.2 to a

defendant who sent extortionate threats through the mail, even where the defendant had no clear intention of carrying out the threats. United States v. Rosen, 896 F.2d 789 (3rd Cir. 1990). As the court there stated, "the intent to carry out the threat is irrelevant to the offense." Id. at 791. Similarly, Lima's conduct falls within the scope of Section 2B3.2 Limas used threats, and participated in a conspiracy which used threats and violence, to collect an extension of credit. The express language in the commentary discusses actions such as these. The district court, therefore, erred by using the less strict standard of Guidelines Section 2AG.1, "Threatening Communications," an by refusing to apply Section 2B32. in determining Lima's sentence.

B. Downward Departure for Victim Conduct.

The government also challenges the district court's point departure downward

under Guideline Section 5K2.10 based on the conduct of William Burks, one of the victims. We review the legitimacy of departures from the Guidelines under a three-tiered analysis. See Williams, 901 F.2d at 1396. First, we must determine whether the circumstances relied upon by the sentencing judge are sufficiently usual to warrant departure as a matter of law. Review at this level is plenary. Id; Schmude, 901 F.2d at 55-859; United States v. Missick, 875 F.2d 1294, 1301-2 (7th Cir. 1989). If the circumstances warrant such departure we review the record below to determine if the facts exist to support the decision to depart from the Guidelines. At this level of review, we will accept the district court's findings unless they are clearly erroneous. See Williams, 901 F.2d at 1396; United States v. Jordan, 890 F.2d 1968, 972 (7th Cir. 1969); Missick, 875 F.2d at 1301. Finally, we measure the degree

of the departure itself under a standard of reasonableness. Williams, 901 F.2d at 1396.

Section 5K2.10 provides:

> If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:
>
> (a) the size and strength of the victim, or other relevant characteristics, in comparison with those of the defendant;
>
> (b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;
>
> (c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;
>
> (d) the danger actually presented to the defendant by the victim;
>
> (e) any other relevant conduct by the victim that substantially contributed to the danger presented.

Invoking this section, the district court departed downward two points on each defendant's sentence due to the conduct of William Burks. Based on our review record, however, we do not believe that Mr. Burks conduct in this offense is the type that warrants departure under Section 5K2.10. We accept as given that Burks refused to repay his debts to Lima and M & V, and we do not dispute the district court's recognition that Burks has an unpleasant voice and demeanor. This does not, however, excuse the defendants' actions, nor does it warrant departure from the Guidelines. Section 5K2.10 contemplates situations where the actions of the victim provoke the conduct of the offense. See, e.g. United States v. Yellow Earrings, 891 F.2d 650 (8th Cir. 1989) (downward departure warranted where victim pushed defendant, verbally abused her, and attempted to publicly humiliate her when she refused his request for sexual

intercourse). See also United States v. Left Hand Bull, 901 F.2d 647 (8th Cir. 1990) (departure based on victim conduct approved in sentence for threatening letter to ex-wife where husband frustrated by reports of wife's abandonment of child). Here, the victim, Burks, did not engage in the behavior contemplated by Section 5K2.10. Burks' physical blocking of the doorway of his home could not be considered sufficient physical contact to provoke the attach by Bigelow and Vaughan. Burks was at worst an unpleasant and untrustworthy person. This does not excuse beating him, nor the extortion of his funds. The court erred in departing downward based on these facts.

C. Downward Departure for Lima's "Minor Role"

Guideline Section 3B1.2(b), "Mitigating Role," states that "If the defendant was a minor participant in any criminal activity, decrease by 2 levels." The district court

stated that Lima had "sought to use what occurred as a lever to collect the debt that he was entitled to be paid," but that he had not planned the conspiracy, and participated in a relatively minor role. Thus, the court departed downward two points. The application of Section 3B1.2(a) "involves a determination that is heavily dependent upon the facts of the particular ease," see Section 3B1.2 Commentary, and we will reverse the district court's determination only if such a decision is clearly erroneous. See United States v. Miller, 891 F.2d 1265, 1270-1 (7th Cir. 1989). The evidence indicates however, that Lima played a not insignificant role in the conspiracy. He made threats over the phone to Burks and shared information about these conversation with Vaughan and Bigelow. He willingly profited from the threats and violence, even when Burks and Lekkas brought them to his attention. The commentary to

Section 3B1.2 indicates that this section is limited to "a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant" (emphasis added). Lima was not substantially less culpable than Vaughan and Bigelow. The application of Section 3B1.2(b) was clear error.

Thus, we conclude that all three sentences must be vacated. The sentences of Vaughan and Bigelow must be recalculated under Section 2E2.1 with a Base Offense Level of 20. Lima's sentence must be redetermined under Section 2B3.2 with a Base Offense Level of 18. No downward departure should be taken for the conduct of the victim, William Burks nor is any departure warranted for Lima's allegedly "minor" role.

VI. Conclusion

The defendants' challenges to their convictions are without merit. In pursuing a

debt that was apparently justly owed, their methods became violent and unacceptable. As Skylock learned when his collection attempts became too violent, "For as thou urgest justice, be assured Thou shall have justice, more than thou desirest." (The Merchant of Venice, Act IV, Scene i.) The decision below is AFFIRMED. Several errors were committed, however, in the calculation of the defendants' sentences. The sentences are therefore VACATED and REMANDED for redetermination consistent with the Guidelines and this opinion.

A true Copy:

Teste:

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Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

October 30, 1990.

Before

HON. WILLIAM J. BAUER, Chief Judge

HON. WALTER J. CUMMINGS, Circuit Judge

HON. HARLINGTON WOOD, JR., Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 89-2293 vs.	)	
ANTHONY W. VAUGHAN, Defendant-Appellant.	)	
	)	No. 88 CR 411

John A. Nordberg, Judge.

O R D E R

Anthony W. Vaughan filed a petition fro rehearing with suggestion for rehearing en banc on October 12, 1990. No judge in regular active service has requested a vote on the

suggestion for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

United States Sentencing Commission, Guidelines Manual

Section 2B3.2. Extortion by Force or Threat of Injury of Serious Damage

(a) Base Offense Level: 18

(b) Specific Offense Characteristics

(1) If the greater of the amount obtained or demanded exceeded $2,500, increase by the corresponding number of levels from the table in Section 2B3.1.

(2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished, displayed, or possessed, increase by 3 levels.

(3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent of Life-Threatening Bodily Injury	add 6

(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

Section 2E2.1. Making, Financing, or Collecting an Extortionate Extension of Credit

(a) Base Offense Level: 20

(b) Specific Offense Characteristics

(1) (A) If a firearm was discharged increase by 5 levels; or

(B) If a dangerous weapon (including firearm) was otherwise used, increase by 4 levels; or

(C) If a dangerous weapon (including a firearm) was brandished, displayed or possessed, increase by 3 levels.

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

Collection of Extensions of Credit by Extortionate Means.

(a) Who ever knowingly participates in any way or conspires to do so in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof shall be fined not more than $10,000.00 or imprisoned not more than 20 years or both

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means, or that the nonrepayment thereof was punished by extortionate means

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in Section 892(b)(1) or the circumstances described in Section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditors collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in

fact carried and expressed or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the Defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Section 3742. Review of a sentence

(a) **Appeal by a defendant.**-A defendant may file a notice of appeal in the District Court for review of an otherwise final sentence in the sentence-

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under Section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) **Appeal by the Government.**-The Government, with the personal approval of the Attorney General or the Solicitor General, may file a notice of appeal in the District Court

for review of an otherwise final sentence if the sentence-

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under Section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(c) **Plea agreements.**-In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure-

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) **Record on review.**-If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals-

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) **Consideration.**-Upon review of the record, the court of appeals shall determine whether the sentence-

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for-

(A) the factors to be considered in imposing a sentence, as set forth in Chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the District Court pursuant to the provisions of Section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The Court of appeals shall give due regard to the opportunity of the District Court to judge the credibility of the witnesses, and shall accept the findings of fact of the District Court unless they are clearly erroneous and shall give due deference to the District Court's application of the guidelines to the facts.

(f) **Decision and disposition**

If the court of appeals determines that the sentence-

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and-

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;